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3 RECORD OF ORAL HEARING
4 UNITED STATES PATENT AND TRADEMARK OFFICE

5
6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
8

9 Ex parte SAMMY MING KIT CHAU, SOUNG C. LIEW,
10 VINCENT LAU and PIU B. WONG
11

12
13 Appeal 2009-009961
14 Application 10/825,089
15 Technology Center 2600
16

17 Oral Hearing Held: March 9, 2010
18
19

20 Before CARLA M. KRIVAK, ELENI MANTIS MERCADER, and
21 CARL W. WHITEHEAD, JR., *Administrative Patent Judges*.
22

23
24 ON BEHALF OF THE APPELLANTS:
25

26 WAYNE LIVINGSTONE, ESQ.
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1 The above-entitled matter came on for hearing on Tuesday,
2 March 9, 2010, commencing at 1:01 p.m., at the U.S. Patent and Trademark
3 Office, 600 Dulany Street, Alexandria, Virginia, before Jan M. Jablonsky,
4 Notary Public.

5 MR. LIVINGSTONE: Can I proceed?

6 JUDGE KRIVAK: I think you can. You may.

7 MR. LIVINGSTONE: Okay. The issues in this case have been
8 fully briefed, but with the Board's permission, I would like to explain to the
9 Board some of the distinctions between the art and the claims in support of
10 our position that the current claims are patentable.

11 JUDGE KRIVAK: Okay.

12 MR. LIVINGSTONE: First, I would like to give a brief
13 overview of the background to the invention. The invention generally
14 relates to wireless communications, and specifically to managing wireless
15 communications associated with a plurality of mobile wireless devices.
16 Wireless devices communicate through access points that cover specific
17 geographic areas. If the wireless device is located on a vehicle, as the
18 wireless device moves from the service area of a first access point to the
19 service area of a second access point, the mobile device has to switch
20 communication from one access point to another.

21 JUDGE KRIVAK: Okay.

22 MR. LIVINGSTONE: That switch can result in a loss of
23 communication data as the wireless device loses communication from the
24 first access point and initiates communication with the second access point.

25 JUDGE KRIVAK: Okay.

1 MR. LIVINGSTONE: From this background the current
2 application disclosed embodiments of the invention where an intelligent
3 wireless switch switches communication between wireless devices and
4 wireless access points. The wireless switch enables substantially continuous
5 wireless communications to a car by using a plurality of stations to associate
6 with different access points. I'd like to address now the distinction between
7 the claimed invention and the references. And if it's okay with the Board, I'd
8 like to start with Claim 13, which is an apparatus claim. Is that okay?

9 JUDGE KRIVAK: Yes.

10 MR. LIVINGSTONE: Okay. Claim 13 requires a wireless
11 switch comprising plurality of stations for communicating with the plurality
12 of access points. Further, the wireless switch comprises a package switch
13 controller for directing data between the plurality of stations and the
14 plurality of wireless devices.

15 JUDGE KRIVAK: Okay.

16 MR. LIVINGSTONE: Now the Examiner concedes that the
17 primary reference, Averbuch, does not teach a plurality of stations of a
18 wireless switch for communicating with the external access points.

19 JUDGE KRIVAK: Okay.

20 MR. LIVINGSTONE: Consequently the Examiner relies on de
21 Torbal's on board unit, OBRU to teach the plurality of stations of a wireless
22 switch.

23 JUDGE KRIVAK: Okay.

24 MR. LIVINGSTONE: But based on the explicit teachings of de
25 Torbal, the OBRU is not a wireless switch. The OBRU merely monitors the
26 position of the vehicle as it travels along the planned route relative to the

1 base stations which will serve the vehicle along its route. And this
2 disclosure is in paragraph 21 of de Torbal.

3 JUDGE KRIVAK: Okay.

4 MR. LIVINGSTONE: Significantly, paragraph 25 of de Torbal
5 says, and -- "The on board unit 26 does not control or become involved in
6 the normal communications between the mobile radios 28 and the cellular
7 network." But as if paragraph 25 was not clear enough, de Torbal states in
8 paragraph 32, "Again, the on board unit 26 is not involved in the actual
9 handover operations. Existing and often standardized handover procedures
10 and protocols are performed, just earlier in time." Because the on board unit
11 does not control or become involved in the normal communications of the
12 mobile radios, de Torbal, the secondary reference, does not teach a wireless
13 switch, much more a plurality of stations of a wireless switch.

14 JUDGE MANTIS MERCADER: Mr. Livingstone, I have a
15 question.

16 MR. LIVINGSTONE: Mm-hmm.

17 JUDGE MANTIS MERCADER: What about Claim 1? In
18 Claim 1 you don't recite anything about a plurality of stations. It says -- it
19 basically recites a second station and a first station.

20 MR. LIVINGSTONE: It does.

21 JUDGE MANTIS MERCADER: So what prevents us from
22 reading a first station and a second station being a single station, one single
23 station? Because, if I may, like, in -- it could -- there could have been a
24 dependent claim, let's say, where it says wherein the first station and the
25 second station are the same station, or the first station and the second station
26 are different stations. What I'm asking is, reading Claim 1, I don't see

1 anything where it says that the first station and the second station are
2 different stations?

3 MR. LIVINGSTONE: Well, by the mere fact that we
4 designated a first station and a second station, our intention is to claim two
5 separate and distinct stations. The read -- the specification -- and for
6 example, the diagrams. We identify two separate stations, which is -- for
7 example, in Figure 3, it's 201-1 and 201-2.

8 JUDGE MANTIS MERCADER: No. I understand that. I
9 understand that. It's just that from my experience there have been cases
10 where the applicant will say a first something and a second something, and
11 then there will be a dependent claim saying wherein the first and second
12 something are the same or they're different.

13 MR. LIVINGSTONE: Right.

14 JUDGE MANTIS MERCADER: So what I'm saying is that
15 Claim 1 does not preclude having a single station where it serves as a first
16 station and a second station.

17 MR. LIVINGSTONE: Okay. If you look at the last limitation
18 of Claim 1 --

19 JUDGE MANTIS MERCADER: Okay.

20 MR. LIVINGSTONE: -- it says switching to routing data
21 between said plurality of wireless devices and the second -- said second
22 access point using said second station. So that switching could not occur if
23 the first and second station were the same. You can't switch within one
24 station. You require two stations to switch. And further --

25 JUDGE MANTIS-MERCADER: Is that true? I mean, you're
26 switching the routing data between, and what you're switching between is

1 the plurality of wireless devices and the second access point. You're
2 switching between the first access point and the second access point.

3 MR. LIVINGSTONE: Mm-hmm.

4 JUDGE MANTIS MERCADER: -- through the station. But
5 what I'm saying is could there be a single station, just as in the primary
6 reference that the examiner used, where there was a just a single station, a
7 single base station that was used to change between access points?

8 MR. LIVINGSTONE: No, it couldn't. Because we are
9 associating a specific first station with a specific access point, and then a
10 separate and second station with a second access point. If we don't
11 distinguish between what is this -- claimed as a first and a second station, the
12 equivalent of that is probably combined in the access points. You know,
13 there's a first and a second access point. I think a reasonable reading of the
14 claim is that we require two separate -- separate stations within the wireless
15 switch. And that is one of the reasons why -- you mentioned that dependent
16 claim where you -- you could have claimed that the first and second stations
17 are the same station. That's why we didn't, because that was not the intent.

18 JUDGE MANTIS MERCADER: No. But you could have also
19 said -- where the first and the second station are different. That's what I'm
20 saying. That's it's --

21 MR. LIVINGSTONE: I read in the claim in light of the
22 specification -- I believe it's clear that we would require two different
23 stations, and that it would not be one station. And, you know, one of
24 ordinary skill in the art would interpret it as two separate stations.

25 JUDGE MANTIS MERCADER: Okay. Okay, thank you.

26 MR. LIVINGSTONE: Okay. Could I sum up on Claim 13?

1 JUDGE KRIVAK: Yes.

2 MR. LIVINGSTONE: Yes. To summarize, neither Averbuch
3 or de Torbal teaches a wireless switch with a plurality of stations, and thus
4 combining Averbuch and de Torbal does not meet Claim 13.

5 JUDGE KRIVAK: Okay.

6 MR. LIVINGSTONE: We have discussed a little Claim 1, but
7 I'd like to make a few points with respect to Claim 1. Is that okay?

8 JUDGE KRIVAK: Absolutely.

9 MR. LIVINGSTONE: Okay. Claim 1 requires associating a
10 second station of said wireless switch with said second access point. The
11 Examiner concedes that the primary reference Averbuch does not teach a
12 first and a second station of a wireless switch. Now is -- this deficiency of
13 Averbuch is very significant, because if Averbuch does not teach a first and
14 a second station, it cannot teach any of the steps that require a second
15 station, such as the last two steps. And I think this even ties into the point
16 that the Judge was making earlier, because the last two steps require
17 monitoring signal strengths of said first and second access points as received
18 by said first and second stations. And switching to routing data between
19 said plurality of wireless devices and said second access point using said
20 second station in response to said monitoring.

21 So as it stands here based on the Examiner's concession that
22 Averbuch does not teach a second station, the reference Averbuch does not
23 teach at least three steps of Claim 1. Because if there's -- if it does not teach
24 does a second station, it cannot teach the other steps that require a second
25 station. So our position is that Averbuch is not even a proper primary
26 reference for rejecting Claim 1.

1 And if we turn to the secondary reference, which is again de
2 Torbal, the deficiencies are as we explained earlier. De Torbal is simply not
3 a wireless switch. The explicit disclosure of de Torbal says that. It does not
4 get involved in the normal communications between the wireless devices
5 and the -- and the access points. Therefore, de Torbal cannot cure
6 Averbuch's failure to teach a second station and the steps requiring a second
7 station. So to summarize, Averbuch and de Torbal, that combination does
8 not meet Claim 1.

9 Claim 9 similarly requires a wireless switch comprising a
10 plurality of stations. And for the reasons discussed earlier, Averbuch in
11 view of de Torbal does not teach the limitations of Claim 9.

12 Any questions on -- on what I've said before?

13 JUDGE MANTIS MERCADER: You also argued something
14 about motivation, right, in your Brief?

15 MR. LIVINGSTONE: Mm-hmm.

16 JUDGE MANTIS-MERCADER: Do you mind going over that
17 again?

18 MR. LIVINGSTONE: In the Brief -- well, we discussed in the
19 Brief whether the Examiner was using impermissible hindsight
20 reconstruction. The basis of asserting that is one, I mentioned earlier,
21 Averbuch does not teach at least three steps of the claimed method, and that
22 shows that Averbuch is not a proper primary reference. And to use it is
23 reconstructing the art to meet the claims improperly.

24 Further, de Torbal specifically -- we pointed this out in the
25 Appeal Brief and the Reply Brief, that de Torbal specifically states -- and it
26 states -- it said it twice. It does not get involved in the communications

1 between the wireless devices and the access point, so it cannot teach a
2 wireless switch. So relying on de Torbal to cure -- to cure Averbuch is
3 really impermissible hindsight reconstruction.

4 Does that address what you were referring to in the Appeal
5 Bbrief?

6 JUDGE MANTIS MERCADER: Yeah. One last question.
7 Where is the wireless switch defined in the claim?

8 MR. LIVINGSTONE: If you look at paragraph 9 of the
9 specification, it talks about the wireless switch. And it says, "The intelligent
10 wireless switch enables substantially continuous wireless communications to
11 occur by successively associating with exterior wireless access points
12 through its plurality of wireless stations." And it says, "Specifically when
13 the intelligent wireless switch first detects an access point, one of" -- so one
14 of the plurality of stations, meaning it could not be one. "One of the
15 plurality of stations associates with that access point. It's
16 associates" -- "associated," sorry, "with the wireless devices. It's routed to
17 and from the access points through the respective station."

18 So I think paragraph 9 reinforces our point that we need two
19 separate first -- two separate stations at least in Claim 1, or in the other -- in
20 Claim 13, a plurality of stations. And one cannot just interpret the claims or
21 the spec as requiring one station instead of two or a plurality.

22 JUDGE MANTIS MERCADER: Thank you.

23 MR. LIVINGSTONE: Thank you. I think I'm out of time.
24 Would we be able to turn over to the next appeal?

25 Whereupon, at 1:20 p.m., the proceedings were concluded.

26